# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SAN FRANCISCO BRANCH OFFICE DIVISION OF JUDGES

UNITED PARCEL SERVICE OF AMERICA, INC.

and

Case 28-CA-19582

**ESTELLA CASTILLO, an Individual** 

David Kelly, Esq., Phoenix, AZ, for the General Counsel. Dawn C. Valdivia, Esq., and Jon E. Pettibone, Esq., Phoenix, AZ, for the Respondent.

#### **DECISION**

#### Statement of the Case

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, on January 19 and 20, 2005. Estella Castillo, an individual (the Charging Party or Castillo), filed an unfair labor practice charge in this case on August 6, 2004. Based on that charge, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint on October 29, 2004. The complaint alleges that United Parcel Service of America, Inc. (the Respondent, the Employer, or UPS) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs.<sup>1</sup> Based upon the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,<sup>2</sup> I now make the following findings of fact and conclusions of law.

<sup>&</sup>lt;sup>1</sup> The briefs and decision in this case were unfortunately delayed for four months due to the reporting service's failure to furnish the official transcript in a timely manner.

<sup>&</sup>lt;sup>2</sup> The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

# Findings of Fact

#### I. Jurisdiction

The complaint alleges, the answer admits,<sup>3</sup> and I find that the Respondent is a New York and Ohio corporation, with offices and places of business in various States, including in Tempe, Arizona, herein called the Respondent's facility, where it has been engaged in the interstate transportation and distribution of parcels. Further, I find that during the 12-month period ending August 6, 2004, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000; and that during the same period, the Respondent performed business services valued in excess of \$50,000 in States other than the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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# **II. Labor Organization**

The complaint alleges, the answer admits, and I find that at all times material herein, the International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL-CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

### III. Alleged Unfair Labor Practices

# A. The Dispute

It is the General Counsel's contention that the Respondent forced the Charging Party to resign from her position as a union steward, because she vigorously sought to enforce the collective-bargaining agreement between the Union and the Employer through the filing of grievances, and by engaging in other union and protected concerted activities. This conduct by the Employer is alleged as a violation of Section 8(a)(1) of the Act. The General Counsel takes the position that as a result of Castillo's vigorous representational and concerted activities she antagonized both her superior at UPS and also officials of the Union. By resigning from her position as steward, Castillo allegedly incurred certain financial obligations toward the Union. The complaint alleges that by its conduct the Employer caused Castillo to incur this additional expense, which constituted a violation of Section 8(a)(3) of the Act.

Further, the General Counsel contends that the Employer violated Section 8(a)(1) of the Act by orally promulgating and maintaining an overly broad and discriminatory rule prohibiting employees from speaking with each other regarding wages, hours, and working conditions, including the resignation of Castillo from her position as union steward. The complaint additionally alleges that the Employer violated the Act by threatening employees with unspecified reprisals for violating this rule, and with discharge for filing grievances under the terms of the contract between the Union and the Employer.

<sup>&</sup>lt;sup>3</sup> All pleadings reflect the complaint and answer as those documents were finally amended at the hearing.

According to counsel for the Respondent, the Charging Party's decision to resign from her position as union steward was in no way influenced or forced by the Employer. It is the position of the Respondent that the events that precipitated the charge in this case were not Castillo's union and concerted activities, but, rather, the fact that she was caught lying to her supervisor. Castillo filed a grievance on her own behalf regarding a failure to receive a holiday turkey from the Employer. Counsel for the Respondent contends that in the course of investigating this grievance, the Charging Party's supervisor discovered that Castillo had fabricated certain facts, and that she was attempting to get fellow employees to support her fabrication. The supervisor confronted Castillo with the accusation and the contention that such dishonesty constituted a dischargeable offense. The Union attempted to resolve this matter with the Employer, during which time Castillo resigned as union steward. According to the Respondent, this resignation was strictly a matter between the Union and Castillo, and the Employer was uninvolved with the decision.

The Respondent denies that its supervisor's action toward Castillo was in any way based on her protected activities. Further, it denies that it violated the Act in any manner as set forth in the complaint.

#### **B.** The Facts

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There are four principal characters involved in this case. They are Estella Castillo, Karen Gray, Darcy Reid, and Karla Schumann. At the time of the events in question, Castillo was employed as a bad address clerk at the Respondent's Tempe facility, and was designated as a union steward. Similarly, Gray was also employed at the Tempe facility, and was designated as a union steward. Reid was, and continues to be, the Respondent's package division manager at the Tempe facility. Schumann was employed by the Union as a business manager/business agent, and she continues to be employed in that capacity.

Unfortunately, the stories told by the four principals are all somewhat different. However, the one at greatest variance from the others is that of Castillo, the Charging Party. The testimony of Schumann, Gray, and Reid are all reasonably similar. In any event, I found Schumann and Gray to be fully credible. Neither Schumann nor Gray had any stake in the outcome of this proceeding. They impressed me as candid witnesses, willing to tell the truth under difficult conditions, where their testimony would likely place others with whom they had to work in an unfavorable light. In my opinion, they were willing to tell the truth regardless of the consequences, and "let the chips fall where they may."

On the other hand, I did not find either Castillo or Reid to be fully credible. Both clearly had a stake in the outcome of the proceeding. I got the distinct impression from their testimony that for Reid and Castillo these matters had become personal. They presented themselves as if their reputations were on the line, and "wining" was for them a matter of "saving face." Later in this decision, I will give specific examples of the incredible nature of certain of their testimony. Suffice it to say at this point that I found certain of the testimony of Castillo and Reid to be inherently implausible and unworthy of belief.

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I was particularly impressed with the testimony of Schumann. She came across as a strong willed individual, unlikely to be dissuaded from telling the truth, even if that meant upsetting or antagonizing either Castillo, a former steward and current member of the bargaining unit, or Reid, the Respondent's manager with whom she worked on a daily basis. Her testimony was inherently plausible, and was fully supported by the testimony of Karen Gray. In my view, it clearly had "the ring of authenticity" to it. She testified in a straightforward, dispassionate manner, and I could discern no reason for her to have a personal interest in the

outcome of the proceeding.<sup>4</sup> Accordingly, to the extent that there are variances in the stories of the principal witness, I generally credit Schumann's testimony and her chronology of the events in question.

Estella Castillo began her employment with the Respondent on March 1, 1982. She subsequently worked as a bad address clerk at the Tempe facility for approximately 13 years, transferring to the Respondent's Mesa, Arizona facility in August 2004. She was a union member throughout most of her employment, and from 1983 until February 17, 2003, she served as a shop steward at the Tempe facility.<sup>5</sup> At the time of the events in question, there were approximately 550 to 600 employees who worked at this facility, some of whom were represented by the Union. The Respondent and the Union have had a long-term collective-bargaining relationship, and are currently parties to a contract for the period of August 1, 2002 through July 31, 2008. This contract includes the National Master United Parcel Service Agreement, the Western Region of Teamsters United Parcel Service Supplemental Agreement, and the International Brotherhood of Teamsters United Parcel Service Southwest Package Rider. (G.C. Exh. 2.) Article 4 of the Master Agreement provides that the designation of job stewards is the exclusive right of the Union. The authority of job stewards to investigate and present grievances is also set out in that article. During the time of the events in question, there were 15 to 17 employees serving as stewards at the facility.

Karla Schumann has been the Union's business agent for approximately 6 years. Prior to that time, she was an employee of the Respondent, serving for 8 to 9 years as a job steward. During the period of time that Schumann has been the business agent, the job stewards from the Tempe facility, including Castillo, reported on Union and contract related matters directly to her. Castillo testified that since Schumann became the Union's business agent, she (Castillo) has filed about 100 grievances, on her own behalf as well as on behalf of other employees. Meetings between Schumann and the various stewards who reported to her were held monthly at a restaurant in Mesa, Arizona. According to Castillo, she filed so many grievances that Schumann would meet with her privately prior to the general meeting, so that Castillo did not monopolize the general meeting with her grievances alone.

Schumann testified that Castillo "filed many grievances," but that she (Schumann) had "many stewards and many members [who also] filed many grievances." In any event, Schumann made it clear that however many were filed, there were "never too many." According to Schumann, she met with Castillo before the general meeting began not only because Castillo had numerous grievances to discuss, but also because Castillo took a long time to discuss each of those grievances that she had filed.

<sup>&</sup>lt;sup>4</sup> At the hearing, the Respondent's counsel offered evidence that Castillo had filed a charge with the Board alleging that the Union engaged in unfair labor practices by, among other means, failing to properly represent her at a disciplinary meeting (Case 28-CB-6157), which meeting is also at the heart of the present charge filed against the Respondent. The evidence offered further established that the Regional Director for Region 28 dismissed Castillo's charge, with that dismissal being upheld on appeal by the General Counsel's Office of Appeals. The appeal denial letter specifically stated that, "the evidence indicated that the [u]nion business agent negotiated in good faith an agreement with the Employer that allowed [Castillo] to retain [her] employment." The union business agent referred to was Schumann. (Res. Exh. 1 & 2.)

<sup>&</sup>lt;sup>5</sup> There is some dispute as to whether there was a short hiatus in Castillo's service as shop steward. However, for the purpose of deciding the issues before me, it is unnecessary to resolve this dispute.

Darcy Reid testified that when she arrived at the Tempe facility as a manager in February of 2003, Castillo was already a union steward. Under examination by counsel for the General Counsel, Reid acknowledged that Castillo was an outspoken union steward who did not hide her views. However, Reid disputed counsel's characterization of Castillo as aggressive, preferring to describe her as "passionate." Further, Reid denied counsel's contention that Castillo would sometimes file grievances over matters that Reid considered minor.

While the parties may argue over the number of grievances filed by Castillo and the degree of her union and protected concerted activities, there is no dispute that she was active in filing numerous grievances and was a persistent advocate on behalf of union and employee rights under the terms of the collective-bargaining agreement. Of the grievances that she filed, some were on her own behalf, while others were on behalf of various members of the bargaining unit. However, one grievance in particular is alleged by the General Counsel to have raised the Employer's ire. That grievance was referred to throughout the hearing in this matter as "the turkey grievance."

Darcy Reid testified that the Respondent has a past practice of distributing turkeys to employees during an approximately three-day period in mid-December. Typically, the turkeys are distributed to employees at work from a "turkey trailer." Each employee is entitled to receive a single turkey, but one spouse may pick up a turkey for the other. The Respondent's human relations department is in charge of the distribution. While the parties may disagree as to the specifics, they agree generally that prior to the distribution, the Employer attempts to notify the employees of the dates of the scheduled give away. The disagreement concerns the method utilized by the Respondent to notify the employees, and it appears that at one time or another notice has taken the form of letters sent to employees' homes, verbal notice by supervisors, posted notice at the facility, and cards left in employee work mail boxes. In any event, there is no dispute that Castillo did not get her turkey in December of 2003. She contends that the Respondent failed to notify her of the distribution dates.

According to Castillo, she missed work in mid-December 2003 because she had surgery. Fearing that she might miss the turkey give away because of her absence from work, Castillo allegedly asked two employees to pick up her turkey, if she were not available. According to Castillo, she first called employee and union steward Gregory Phair. Allegedly, Castillo left a voice message for Phair asking him to pick up her turkey in her absence, referencing her surgery, and mentioning that if she failed to hear back from him, Castillo would ask employee and union steward Karen Gray to pick up the bird. Castillo testified that when she did not get a return call from Phair, she called Gray and made the same request of her. The alleged conversation was characterized by Castillo as being very brief, with Gray, who was at work at the time, indicating that she was very busy and complaining about her sick child. Implicit in Castillo's testimony was Gray's agreement to do as requested and pick up Castillo's turkey. While Phair supports Castillo's testimony regarding her request of him, Gray does not. Gray credibly testified that no such conservation with Castillo ever occurred. As I indicated above, Gray has no particular interest in the outcome of this proceeding, and there is simply no reason for her not to be truthful.

While the dates are not entirely clear, it appears that turkeys were distributed to the employees at the Tempe facility on December 10, 11, and 12, 2003. (Res. Exh. 10.) Further, it appears that Castillo was only at work on the first day of distribution, December 10. (Res. Exh. 9.) In any event, and for whatever reason, it is undisputed that Castillo did not receive her turkey. Clearly, this upset her and she considered filing a grievance. According to Castillo, prior

to doing so, she explained to Schumann that the Employer had failed to notify her of the distribution dates, and of her displeasure with not receiving a turkey. Castillo testified that Schumann responded that Castillo should go ahead and file the grievance "for shit and giggles."

Castillo filed her grievance on December 22, 2003. This grievance essentially complains that she did not receive a holiday turkey because of the Employer's failure to properly notify her of the distribution dates. As a remedy she seeks either a turkey or a \$20 gift card. (G.C. Exh. 3.) It was clear from her testimony that she took this matter very seriously.

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Schumann testified that she first saw the "turkey grievance" in early January 2004, when Castillo forwarded a copy to her. Subsequently, they met and Castillo explained that she felt the Employer was unfair in failing to notify her of the distribution dates and give her a turkey. They decided to present the grievance to division manager Darcy Reid, which was the next step in the grievance process. Unfortunately, in their respective testimony, Castillo, Reid, and Schumann disagreed significantly regarding the processing of this grievance, including the number of meetings held, the dates of the meetings, and what was discussed. As I mentioned earlier, I generally credit Schumann's testimony over the testimony of both Castillo and Reid. Schumann impressed me with her candor, directness, and recall of detail. She was obviously a strong willed individual not easily swayed by emotion, and, most significant, she had no personal interest in the outcome of this proceeding. In large measure, Schumann's conduct in processing this grievance has already been vindicated by the dismissal of the unfair labor practice charge (Case 28-CB-6157), which Castillo filed against the Union. (Res. Exh. 1 & 2.) The same cannot be said for Reid and Castillo, for whom the resolution of this dispute has obviously become very personal. Therefore, I will accept Schumann's chronology of the events. and also generally accept her testimony of what transpired in the processing of this grievance.

Schumann testified that there were three meetings with management, namely Darcy Reid, where the turkey grievance was discussed. The first meeting occurred on January 12, 2004, and was attended by Schumann, Castillo, and Reid. The meeting took place in Reid's office, and numerous grievances were reviewed. There was not a lot of discussion about the turkey grievance on that particular date, merely a brief recitation of the complaint contained in the grievance.

The same individuals met the following day, January 13, still in Reid's office, when multiple grievances were again discussed, including the turkey grievance. Schumann recalls some discussion about how the Employer notifies its employees of the distribution dates, with Castillo contending that she never received notice. Reid indicated that in an effort to reduce costs last December, the Employer's managers notified employees while at work of the dates, rather than mailing notices to employee homes. This explanation did not satisfy Castillo, who, according to Schumann, complained that she was a 21-year company employee, who was "gypped" by not receiving a turkey. Castillo continued to insist that she was entitled to either a turkey or to a gift card. At this point, Reid mentioned that Castillo might not have received notice because she was absent from work on two out of the three days when the turkeys were distributed. Schumann testified that for the first time Castillo claimed that her absences should not have mattered as she had asked Karen Gray to pick up a turkey for her. Further, Castillo claimed that Gray had been unable to pick up Castillo's turkey because the "guards" would not allow her to do so.<sup>6</sup> In response, Reid asked Castillo why she had not immediately notified Reid or another supervisor of the alleged refusal by the guards to permit Gray to leave the facility with

<sup>&</sup>lt;sup>6</sup> The Respondent utilizes private security guards, non-employees, who are responsible for clearing employees to enter and exit the facility.

Castillo's turkey. Castillo had no answer, and the grievance was "tabled" at Schumann's suggestion. According to Schumann, a grievance that is tabled is set aside for some latter action.

Following the decision to table the turkey grievance, Schumann asked for a break in the meeting, and went outside to smoke a cigarette. She had "reservations" about the grievance, and was bothered by Castillo's claim that she had asked Gray to get the turkey. While outside on the break, Schumann called Gray, explained the situation, and asked her whether Castillo had requested that Gray pick up a turkey for Castillo, and had been prevented from doing so by the guards. According to Schumann, Gray seemed reluctant to give Schumann a direct answer. However, in her blunt, no nonsense manner, Schumann asked Gray for "a yes or no answer...an honest answer." Schumann testified that Gray answered in the negative. Castillo had never made such a request of her, and so the guards never prevented her from leaving the facility with a turkey for Castillo. According to Schumann, this conversation lasted less than a minute and had occurred while Gray was still at work. It is important to note that Gray's testimony full supports Schumann's version of their telephone conversation.

Gray is a union steward, and as I indicated earlier, she had no motive to be less than truthful at the hearing. She had no obvious interest in the outcome of this proceeding, and no reason to want to embarrass Castillo, a fellow employee and former union steward. Gray credibly testified that a number of weeks after her telephone conversation with Schumann, she was getting ready to punch out from work at the time clock when approached by Darcy Reid. According to Gray, Reid asked whether Castillo had ever requested that Gray pick up a turkey for Castillo. Gray initially responded that she did not want to talk about the matter, but Reid persisted. Finally, Gray told Reid that, "it never happened." Reid's testimony for the most part supports Gray. According to Reid, Gray was initially hesitant about answering Reid's question, but ultimately acknowledged that Castillo had never asked her to pick up a turkey. Further, Reid testified that Gray also said that Castillo wanted Gray to "lie" for her, which Gray would not do.

The next matter of significance occurred on approximately February 10, 2004. Reid testified that she called Schumann and notified her of what Gray had said. Reid was concerned that she had two union stewards with different stories about the turkey incident, and with one allegedly asking the other to lie to management. Reid asked Schumann to "follow up" on the matter. Schumann did so, arranging to meet later that same day with Castillo at a Denny's restaurant.

Schumann informed Castillo that Reid had called and told her that Castillo's and Gray's "stories were not matching." Reid had come to this conclusion after speaking with Gray. According to Schumann, Castillo responded that the stories should match up, and she became "a little agitated." Castillo then said that the grievance had been withdrawn, but Schumann disagreed, saying that it had merely been tabled. Schumann said, "The question is still out there," and repeated "the stories are not lining up." At this point, Castillo took a copy of the grievance<sup>7</sup> and wrote across the bottom half, "UPS is to [sic] Cheap to Take Care of Their Employees." According to Schumann, Castillo also wrote "Refused to Do Anything With this Grievance -- Withdrawn" on the grievance form. Schumann then placed her own initials and the date on the form, with the words "Per Stella W/D," meaning that Castillo had withdrawn her

<sup>&</sup>lt;sup>7</sup> It is unclear from the record whether this was a copy of the original turkey grievance or a duplicate original of the grievance. Also unclear is whether Castillo or Schumann produced this document at Denny's. In any event, the origin of this grievance form is unimportant, and it is only significant to determine what became of this document.

grievance. (G.C. Exh. 4.) While Castillo testified that this meeting at Denny's never occurred, I do not find her denial credible. Schumann's detailed testimony of the incident has "the ring of authenticity" to it. Castillo admits that she made the notations attributed to her, but contents she wrote these comments at an earlier meeting in the presence of both Schumann and Reid. In light of Reid's subsequent reaction to Castillo's written comments, Castillo's version of events is simply not logical.

Following making her own notations on the grievance form, Schumann emphasized to Castillo that while the grievance was now withdrawn, Reid still had issues she needed to resolve, because Castillo and Gray had told different stories. According to Schumann, Castillo could not understand why this was so, taking the position that since the grievance was withdrawn, the matter should now be closed.

Schumann testified that Reid continued to pursue the matter, and a third meeting was held on February 17, 2004. Castillo was unaware that this meeting had been scheduled, and was apparently surprised when Schumann called her to the meeting. Schumann informed Castillo that the meeting was being held because Reid wanted to resolve the issue of the conflicting stories told by Gray and Castillo. Again, the meeting was held in Reid's office, and only Reid, Schumann, and Castillo were present.

According to Schumann, Reid opened the meeting by saying that she had spoken with Gray, who had said that Castillo never asked her to pick up a turkey. Castillo continued to claim that she had in fact asked Gray for the favor. Reid said that obviously somebody was lying, either Gray or Castillo. Then, according to Schumann, for the very first time, Castillo mentioned Greg Phair. She claimed that besides talking with Gray, she had also left a voice message for Phair to pick up her turkey. Schumann wanted to know why Castillo had not mentioned this earlier, and Castillo then claimed that she had told them in an earlier meeting about her call to Phair. Responding, Schumann told Castillo that she had not done so. In Schumann's testimony, she characterized this new claim by Castillo as "grasping at straws."

Reid, Castillo, and Schumann each seem to remember this meeting somewhat differently. Reid recalls telling Castillo several times that the issue was now not the grievance itself, but a matter of dishonesty. According to Reid, they discussed the seriousness with which the Employer took acts of dishonesty by its employees, and that such offenses could result in discharge. Further, according to Reid, she mentioned the importance she placed in what the union stewards had to say. She often relied on their word in trying to resolve grievances. Now she was faced with the situation where two stewards were directly contracting each other. Obviously, one of them was lying. Neither Castillo nor Schumann contradicted this version of the early part of the meeting as testified to by Reid. As it seems logical that these matters would have been raised by Reid, I credit this part of her testimony.

While I find Castillo generally incredible, there are certainly parts of her testimony that I find truthful. It is axiomatic that a witness can be truthful concerning some matters and not others. Such is the case for Castillo regarding Reid's reaction to the references Castillo had previously made on the turkey grievance form. (G.C. Exh. 4.) According to Castillo, Reid had just finished talking about the importance that the Employer placed on honesty, and had threatened that somebody, either Gray or Castillo, was going to be fired for lying. Then, according to Castillo, Reid "shook" the grievance form and said, "The Company is to [sic] cheap to take care of their employees." Reid was visibly upset, and was obviously reading the notation that Castillo had earlier placed on the form. Castillo testified that she was surprised that Reid had a copy of this form, as Castillo had left it with Schumann at Denny's when the grievance

had been withdrawn. Castillo asked why they were discussing the grievance, when it had been withdrawn. Reid, still upset, made the statement that she could not deal with a dishonest steward, at which point Schumann took Castillo outside to talk with her privately.

It is really not significant how Reid got a copy of the grievance form with Castillo's "cheap" notation on it. It may very well be that Schumann gave it to Reid to show her that the grievance had been withdrawn. However, what is very important is Reid's reaction to the "cheap" notation. She was obviously very upset, apparently believing that the accusation that the Employer was too cheap to provide Castillo with a turkey was an untruthful and malicious statement. As I will discuss later in this decision, it is my conclusion that Reid was sufficiently upset with Castillo for making the cheap reference as to threaten her with discharge.

It should be noted that in her testimony, Reid never denies shaking the grievance form or repeating the reference on the form to the Employer being cheap. She was familiar with the grievance form containing the "cheap" reference (G.C. Exh. 4.), but testified that she could not recall when she first saw the document. When asked by counsel for the Respondent, Schumann testified that she had "[no] recollection" of Reid holding up the turkey grievance and repeating Castillo's claim that the Employer was too cheap to pay for a turkey. Never the less, I am convinced that Reid did precisely what Castillo claims. Something obviously greatly upset Reid. She demonstrated what upset her by holding up the form, shaking it, and repeating what was for her, Castillo's offensive statement. Nothing testified to by Reid or Schumann makes me any less inclined to believe this particular aspect of Castillo's testimony.

According to Schumann, when Reid mentioned that dishonesty was a terminable offense, Castillo started to cry. At that point, Schumann took Castillo outside. Schumann testified that Castillo said that she could not believe how this matter had escalated over a turkey. Schumann responded that one of her stewards was not being truthful, and she asked Castillo "to come clean." However, Castillo stuck with her story of having called Gray. Finally, Schumann told Castillo that if "it becomes an issue of discharge," Castillo did not have a good case. Schumann informed Castillo for the first time that she had already spoken with Gray, and Gray did not support Castillo's claim. According to Schumann, Castillo got "flustered," and insisted that Gray must have simply forgotten the incident.

Castillo never admitted that she fabricated the story of having asked Gray to pick up her turkey. Convinced that Castillo had done so, Schumann told Castillo that she had lost her "integrity" in Schumann's eyes, as well as those of Reid, coworkers, and stewards. Schumann pointed out to Castillo that the issue of "lost integrity" was separate and apart from any question of her discharge. According to Schumann, Castillo's actions had caused the Employer to question another steward's credibility. This was a situation that Schumann, as the union business agent, could not abide. She informed Castillo that she could not have somebody who was dishonest with her and with management representing the employees. Schumann testified that she told Castillo, "Either you can resign as a steward, or I am going to remove you."

According to Schumann, Castillo responded by saying that Reid was behind her removal as steward. However, Schumann denied this both to Castillo and in her testimony. Schumann credibly testified that she had never previously discussed with Reid the possibility of Castillo's resignation as steward. Schumann told Castillo that management had nothing to do with whether she was removed from the position of steward, which was solely a union matter. Further, Schumann informed Castillo that while she wanted to keep Castillo from being fired, that was a separate issue from the steward question. Finally, Castillo acquiesced, telling Schumann, "I will just resign, as a steward, if you think it is going to help." Schumann responded, "Gees, Estella, I do not think it is going to hurt."

Schumann left Castillo outside, while she went back into Reid's office. According to Schumann, Reid was "ticked off," believing that Castillo had lied to her and Schumann's faces. Reid told Schumann that Castillo was "lying through her teeth." Reid insisted that proven dishonesty was a terminable offense, and she could fire Castillo. Further, Reid mentioned that she held stewards to even a higher standard than she did managers, because she relied on their word in trying to resolve grievances. Schumann testified that she told Reid she knew Castillo was lying, but asked her not to fire Castillo, who was a 20-year employee with a good work record. She told Reid that what Castillo had done, lying to them, was personally upsetting, but it was not a terminable offense, and "not worth taking somebody's career over it." It was only at the end of their conversation, after Schumann sensed that Reid was not going to fire Castillo, that Schumann mentioned that Castillo had decided to resign as steward.

Schumann brought Castillo back into Reid's office. According to Schumann, Reid gave Castillo a lecture about how she had been caught lying about the turkey grievance, which under the Employer's proven dishonesty policy was a terminable offense. However, Reid agreed with Schumann that because Castillo was a long-term employee, the Employer would not discharge her. Following Reid's statement that Castillo would not be terminated, Schumann pronounced in the presence of both Castillo and Reid that Castillo was resigning her position as steward.

Schumann credibly testified that both she and Reid were concerned with helping Castillo "save face." They did not want employees or managers to conclude that because Castillo had resigned as steward that she had in some way been dishonest in the processing of the turkey grievance. Schumann and Reid decided to spread the word that Castillo had resigned as steward "for personal reasons," specifically because she needed to be away from work for a while due to a medical condition. Apparently, at about that time, Castillo had planned on having surgery on her foot. Schumann testified that they did not want any negative connotation associated with the resignation. They hoped to minimize "chit-chat" about the resignation on the "shop floor." According to Schumann, she and Reid discussed these matters in Castillo's presence. During her testimony, Schumann specifically denied that at the meeting there was any reference to repercussions to Castillo for disclosing what had transpired. Schumann contends that Castillo was very quiet during this conversation.

Reid generally supports Schumann's version of this meeting and conversation. Reid does add that as Castillo was not actually disciplined, there was no reference in the Employer's personnel records to Castillo lying about the turkey grievance. Also, at the hearing the parties stipulated that Castillo's individual personnel file was silent as to any allegation of dishonesty concerning the turkey grievance. According to Reid, in an effort to protect Castillo's reputation, she told Castillo that the matter would stay in her office and would not be discussed with the managers. As further protection, Castillo was told that if she heard any "gossip" about these matters on the floor, by either employees or managers, she should inform Reid.

Castillo testified that her resignation as steward was orchestrated by Reid, who used a threat to discharge her as a means of forcing her to resign. Further, she alleges that Reid told her if she talked about the turkey grievance or the resignation as steward with other employees that there would be "repercussions." Reid did in fact resign as union steward, and shortly thereafter also resigned from the Union.

According to Gray, in January of 2004 she told Castillo that she had informed Reid and Schumann that Castillo never asked her to pick up a turkey. Never the less, Castillo persisted during January and February of 2004 in trying to get Gray to say that she simply could not remember, or had forgotten, whether Castillo had called her in December with a request that she pick up Castillo's turkey. Gray testified that Castillo "kept wearing this turkey thing out,"

going so far as to suggest to Gray that she tell management that she could not recall the incident because at the time she was preoccupied with a sick child. Castillo told Gray that the Employer might fire her (Castillo), and that Gray needed to protect Castillo's "back." It was Gray's feeling that Castillo wanted her to lie to Reid, which Gray was not willing to do. Gray testified that despite telling Castillo that she was not going to change her story, these entreaties from Castillo occurred almost every day in January and February of 2004, and continued sporadically until as late as October of 2004.

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Greg Phair has been a full time employee of the Respondent at the Tempe facility since 1996, and has been a union steward for 3 years. Phair testified that at around the time the Employer was giving out turkeys, he received a voice mail message from Castillo. The message indicated that Castillo was not at work due to a foot problem. According to Phair, Castillo's message requested that he pick up a turkey for her, and mentioned that she was also going to try to make contact with Karen Gray or Gray's husband. Phair testified that he never actually picked up a turkey for Castillo, because he got the message after the birds were distributed.

Phair claims to have had a number of conversations with Gray, where they discussed the issue of Castillo's turkey grievance. According to Phair, Gray told him that she was once at a meeting with Reid and Schumann where she was asked about whether Castillo had contacted her with a request that she obtain a turkey for Castillo. Allegedly, at the end of their meeting, Gray was told that she was not to talk about this matter. Further, Phair testified that in a number of conversations with Gray, she made it clear to him that she really could not remember whether Castillo had asked her to pick up the turkey, or not. Allegedly, Gray gave Phair the impression that Schumann had pressured her into giving a yes or no answer to the question of whether Castillo had contacted her with the turkey request, and so she had answered in the negative.

Phair testified that Reid had never asked him anything about this matter. However, he thought that Schumann had discussed the turkey grievance with him, but he was "not positive." Further, Phair testified that Castillo mentioned to him that because of the turkey grievance her job was on the line, and her integrity was being questioned. He indicated that this conversation occurred after Castillo ceased being a steward.

I did not find Phair's testimony to be either particularly credible or helpful. He appears to me to be a witness from "out of the blue," procured by Castillo to give support to her story. According to the credible testimony of Reid and Schumann, Castillo did not raise Phair's name until late in the process of considering the grievance. I share Schumann's conclusion that this was an effort by Castillo to "grasp at straws." Further, even assuming that Castillo did call Phair and leave him a voice message about picking up a turkey and mentioning Gray's name, that does not establish that Castillo ever actually contacted Gray with the request. As mentioned earlier, I have fully credited Gray's denial that such a request was ever made by Castillo. Gray's testimony that Castillo never contacted her with the request left no room for ambiguity.

Regarding Phair's testimony about what Gray allegedly said was told to her by Reid and Schumann, such testimony is pure hearsay.<sup>8</sup> It is the out of court statement of a declarant, namely Reid and Schumann, offered to prove the truth of the words spoken, the matter being asserted. Upon reflection, I am unaware of any exception to the hearsay rule, which would

<sup>&</sup>lt;sup>8</sup> Such testimony, twice removed, is commonly referred to as double hearsay.

allow such testimony to be considered. Accordingly, I will disregard it. However, even if I were to consider it, I am of the view that the denials given by Reid and Schumann, to the issues raised by Phair, are credible.

Phair is simply too convenient a witness. He was clearly doing his best to support Castillo's position. However, his testimony never sheds any light on why Gray or Schumann would have a motive to harm Castillo. I view Gray and Schumann as essentially neutral witnesses, with no stake or interest in the outcome of this proceeding, and no reason not to be truthful.

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As should be obvious by now, deciding the issues in this case depends largely on an analysis of which witnesses are being truthful. Much of the testimony is in dispute, and no witnesses' story is perfect. Memories fail over time. However, based on my analysis as expressed above, I believe that the weight of the credible evidence clearly supports the conclusion that Castillo fabricated the "turkey" conversation with Gray in an effort to support her grievance. She continued to be untruthful in her conversations with Reid and Schumann about the grievance, and in her testimony before the undersigned. With the exception of the threat to discharge explained above, I do not credit Castillo's testimony when other witnesses dispute it.

# **C.** Analysis and Conclusions

# 1. The Threat to Discharge Estella Castillo

There are essentially four factual allegations set forth in the complaint that are in dispute. These include the complaint allegations that the Respondent threatened to fire employees because they filed grievances, forced Castillo to resign her position as union steward, promulgated a rule prohibiting employees from speaking about Castillo's resignation, and threatened to fire them if they violated this rule. The events in question all allegedly occurred during the course of the meeting held on February 17, 2004 to discuss the turkey grievance.

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Paragraph 5(d) of the complaint alleges that on February 17, 2004, the Respondent, by Reid, threatened to fire its employees because they filed grievances under the terms of the parties' collective-bargaining agreement. Under the General Counsel's theory of this case, it was Castillo who was allegedly threatened with discharge because she filed and processed the turkey grievance. Of the four factual allegations in dispute, this alleged threat was the first to occur.

As I have already noted, because I found Schumann generally credible, I have accepted her chronology of the events in question. According to Schumann, she, Reid, and Castillo met for the third time to discuss the turkey grievance on February 17. All three testified that Reid explained that she had spoken with Gray, who denied that Castillo had ever asked her to pick up a turkey. Reid made it clear that Castillo's and Gray's stores were "not lining up" and that one of them was lying. Further, all three witnesses agree that Reid spoke at length about dishonesty being a terminable offense. The Charging Party continued to insist that she was being truthful about having requested the favor of Gray, but it had become clear that Reid, who was visibly upset, did not believe her. At this point, the testimony of the three witnesses is somewhat different.

According to Castillo, Reid "shook" the grievance form and repeated the words, which Castillo had previously written on the form, that "UPS is to [sic] cheap to take care of their employees." Reid then allegedly said, "I cannot have a dishonest steward. I cannot deal with a

dishonest steward." Apparently, Castillo started to cry, and Schumann asked for a break and took Castillo outside for a discussion away from the presence of Reid.

Regarding this instance alone, as I explained earlier, I have credited the testimony of Castillo over that of Schumann and Reid. Schumann testified that she had "[no] recollection" of Reid holding up the grievance, shaking it, and making the reference to the Employer being cheap. However, having no recollection is far different than an unequivocal denial that the event ever happened. While Reid does not mention this incident in her testimony, I am convinced that it occurred. It is undisputed that she was very upset with Castillo throughout the first part of this meeting. Reid clearly indicated that she did not believe Castillo, thought that she was lying, and was guilty of violating the Respondent's policy on dishonesty, for which she could be discharged. I have no doubt that in the face of Castillo's continued denials, Reid lost her temper sufficiently to shake the grievance form and read what she obviously considered to be Castillo's disparaging comment about the Employer being cheap. Reid's frustration with Castillo was obviously exacerbated by the reference that Castillo had made on the grievance form. Castillo's version of this event is inherently plausible, and it "just sounds right."

It is the Respondent's position that it has "zero tolerance for dishonesty." The Respondent's Policy Book states that the Employer expects "honesty from our people in all their duties, including their handling of money, merchandise, and property with which they are entrusted," in "the preparation and approval of reports," and "in their assessment of themselves." (Res. Exh. 6.) This policy is incorporated into the collective-bargaining agreement. (G.C. Exh. 2, Western Conference Supplemental Agreement, Art. 28, Sec. 2.) According to Reid, dishonest acts constitute 1 of 7 "cardinal sins," including unprovoked assaults, use of drugs, and willful damage to Respondent's property, and which under the terms of the contract permit immediate discharge without any previous warning.

Reid testified that after talking with Gray, she was of the belief that Castillo was being dishonest about the turkey grievance and planned to fire Castillo for that dishonesty. It is the Respondent's position that any such discharge would have been in conformity with its policy on "proven dishonesty," and totally unrelated to Castillo's union or protected concerted activity. To the contrary, the General Counsel argues that Reid's displeasure with Castillo and her threat to discharge Castillo were solely the result of Castillo's having filed and processed the turkey grievance. As to this allegation, I am in agreement with the General Counsel.

The Board and the Courts have long held that the filing of a grievance is protected concerted activity as defined in Section 7 of the Act. *United Parcel Service of Ohio*, 321 NLRB 300, 322 (1996), citing *Ladies Garment Workers v. Quality Mfg. Co.*, 420 U.S. 276 (1975). It is axiomatic that any attempt to discipline or discharge employees for exercising this right violates Section 8(a)(1) of the Act. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 836 (1984); *Prime Time Shuttle International*, 314 NLRB 838, 841 (1994); *Thor Power Tool Co.*, 148 NLRB 1379, 1380-81 (1964), enfd. 351 F.2d 584 (7<sup>th</sup> Cir. 1965).

Counsel for the Respondent argues that it was not the filing of the grievance, which led to Reid's threat to discharge Castillo, but, rather, Castillo's dishonesty in alleging that she had asked Gray to pick up her turkey. However, I do not believe that the filing of the grievance can be separated from the evidence offered by Castillo in support of that grievance. Castillo's grievance claimed a failure to receive a turkey, which claim was supported by Castillo's alleged attempt to have Gray pick up her bird. As I have repeatedly said, I do not believe Castillo's story, and, obviously, neither did Reid. However, what appeared to "set her off" was the manner

by which Castillo processed the grievance, in particular the reference on the grievance form to the Respondent being cheap. Already visibly upset with Castillo, Reid "shook the grievance" and repeated the disparaging reference that Castillo had written on the form.

As counsel for the General Counsel points out in his post-hearing brief, Castillo did not lose the protection of the Act in pursuing this grievance, even assuming, as I do, that she lied about asking Gray for assistance. The Board has long held that when employees engage in protected concerted activity, a certain amount of leeway is allowed in terms of the manner in which they conduct themselves. *Aristook County Regional Ophthalmology Center*, 317 NLRB 218, 221 (1995); *Health Care Corp.*, 306 NLRB 63, 65 (1992). An employee may lose the protections of the Act if his conduct is egregious enough. However, this is a high standard, which ensures that an employee will lose the Act's protections only if his conduct is so flagrant, violent, or extreme so as to render him unfit for future employment. See *American Steel Erectors, Inc.*, 339 NLRB 1315, 1316 (2003); *Dreis & Krump Mfg.*, 221 NLRB 309, 315 (1975). The burden is on an employer to prove that an employee's conduct meets this high standard. *American Hospital Association*, 230 NLRB 54 (1977). In the context of the filling of a grievance, the Board has held that, "[t]he merit of a grievance does not determine whether the filling is protected... It is only extreme behavior on the part of the employee that removes his actions from the protection of the Act." *Wayne W. Sell Corp.*, 281 NLRB 529, 532 (1986).

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In the matter at hand, the Respondent has not met this burden. The Respondent's honesty in employment policy is primarily an effort to protect the integrity of its core business, namely the delivery of packages, many of which are valuable, the receipt of COD money, and the filing of delivery reports by its employees. Employee honesty is integral to its business operation. Reid acknowledged as much. However, her contention that Castillo's untruthful statement about Gray was equally egregious is simply not logical.

As I noted, I do not believe that the filing and processing of the grievance by Castillo can be separated from her offering support for that grievance by alleging her contact with Gray. Even assuming that Reid was really only upset with Castillo because she lied about Gray's involvement, such conduct by Castillo would not meet the high standard of egregiousness required to forfeit the Act's protections. If employees needed to maintain total veracity and accuracy in the filing and processing of grievances, such would surely chill their willingness to engage in Section 7 activity. The Act would lose much of its meaning if employees felt that they had to tread cautiously or be "polite" when engaging in protected activities. *Carolina Freight Carriers Corp.*, 295 NLRB 1080, 1083 (1989). Also, see *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7th Cir.1946) (layoff of union official because he refused to correct misrepresentation concerning wage scales violated the Act); *Wayne W. Sell Corp*, 281 NLRB 529, 532 (1986) (meritless grievances do not lose protection); *Liberty Nursing Homes, Inc.*, 245 NLRB 1194, 1202-1203 (1979); *Ad Art, Inc.*, 238 NLRB 1124, 1131 (1978) (employee still protected by the Act even though he had filed two dubious claims for pay in grievances and had filed multiple grievances); *Max Factor Co.*, 239 NLRB 804, 817 (1978).

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Of particular significance is a Board case with the same Respondent as in the matter before me, where in both cases the Respondent relied on its honesty in employment policy. In *United Parcel Service of Ohio*, 321 NLRB 300 (1996), several employees had filed separate grievances claiming that they were delayed at the company's metal detector, and were seeking compensation for the delay. However, those grievances contained specific factual allegations that were "false," namely that the employees were required to open bags and/or remove certain personal items. The Respondent fired these employees under its honesty in employment policy for "falsification of facts submitted in the grievance." This is precisely what the Respondent contends it could have legally done in the matter before me. The Board, however, disagreed,

noting that "[t]he filing of a grievance is protected concerted activity." Id. at 322. According to the Board, the Respondent's conduct in discharging these employees "improperly attacks the protected status of these grievances for it would require grievants to have tested the propriety of all their claims and assertions prior to filing a grievance or be subject to discharge. Such a requirement threatens to divest Respondent's employees of their right under the collective-bargaining agreement to file grievances." Further, the Board noted that, "[t]he grievance process itself is the mechanism that tests the reasonableness of the complaints." Id. at 325. The Board found the Respondent's conduct to be violative of the Act.

In a recent case, *Limbach Co.*, 337 NLRB 573, 589 (2002), the Board stated what should have been obvious to Reid, that being that conflicting stories may arise in the grievance process. The Board emphasized that employers should not be able to use such conflicts as an excuse for discipline since "the entire process of collective bargaining is structured and regulated on the assumption that the parties proceed from contrary and to an extent antagonistic viewpoints of self interest." The Board held that an employer violated the Act when it threatened an employee with discharge if she retained her position as union steward.

While Reid had concluded that Castillo lied about Gray's involvement in this matter, with which conclusion I concur, it does not alter the fact that Castillo was engaged in protected concerted activity when she filed the grievance. Even assuming the worst of Castillo, that she was involved in a campaign to gather false statements of support for her position regarding the turkey, her conduct was clearly not so egregious as to forfeit the Act's protection. As the Board noted in *United Parcel Service*, "[t]o hold otherwise could still enforcement of the collective-bargaining agreement through the use of the grievance procedure by causing employees and stewards to FEAR any inadvertent misstatement or misunderstanding could lead to discharge." Id. at 326 (emphasis in original).

I have assumed for the sake of this discussion that Reid was concerned not with the processing of the grievance itself, but with Castillo's untruthful statements regarding Gray's alleged involvement. However, in fact, I do not believe this to be the case, and I find Reid's argument disingenuous. As I alluded to earlier, I believe that what really "set Reid off" was the reference Castillo made on the grievance form to the Respondent being cheap. Reid's reaction to this reference manifested itself in Reid shaking the form and reading verbatim what Castillo had written. Reid was visibly upset at the time. Thus, what apparently truly bothered Reid was the manner in which Castillo chose to process the grievance, by making the disparaging reference to the Respondent as being cheap. There can be absolutely no doubt that the method by which a union steward chooses to process a grievance is integral to the collective-bargaining process. In order to have effective representation and bargaining, an employer cannot establish rules that tend to chill employees' exercise of Section 7 rights, in particular the processing of grievances. *United Parcel Service, supra.* Such conduct by the Respondent would, in my view, be repugnant to the Act.

Finally, I would note that even assuming Reid was of the "good faith" but mistaken belief that she could legally threaten Castillo with discipline for lying about Gray's involvement, such a mistaken belief does not insulate the Respondent from a finding that the Act has been violated. Since the discrimination against Castillo was based on conduct that constituted protected concerted activity, the pursuance of the turkey grievance, even an honest belief that she should be punished for lying is not a defense. *La-Z-Boy Midwest*, 340 NLRB No. 10, (2003); *Burnup &* 

Sims, 379 U.S. 21 (1964).<sup>9</sup> Therefore, Reid's threat to discharge Castillo constituted a violation of the Act.

In summary, I conclude that the Respondent violated Section 8(a)(1) of the Act by threatening Castillo with discharge because she filed and processed a grievance under the terms of the parties' collective-bargaining agreement, as alleged in paragraph 5(d) of the complaint.

# 2. Castillo's Resignation as Union Steward

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Paragraph 5(e) of the complaint alleges that on February 17, 2004, the Respondent, by Reid, forced Castillo to resign from her position as a union steward in lieu of being discharged. The General Counsel's theory of the case requires a finding that both Reid and Schumann acted in concert in an effort to remove Castillo from her position as steward. The problem with this "Machiavellian" conspiracy theory is that the facts do not support it. Further, it is somewhat inconsistent with the General Counsel's previous position in Case 28-CB-6157 that the Union, through Schumann, properly represented Castillo in the disciplinary meeting with Reid, which allowed her to retain her employment. (Res. Exh. 1 & 2.)

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I find Schumann's version of these events reasonable and inherently plausible. I continue to conclude that she had no motive to lie, and credit Schumann's story over that told by Castillo. Obviously, Castillo had a personal interest in the outcome of this proceeding and her testimony demonstrated the extent of her emotional involvement. In my opinion, such factors would tend to color her version of the events in question. Further, for the most part, Reid's and Schumann's stories are in conformity. Unlike the General Counsel, I do not view this as a conspiracy in support of their alleged joint efforts to remove Castillo from her position as steward, but, rather, as the logical result of Castillo's effort to falsely involve Gray in the dispute.

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According to Schumann, she and Castillo temporarily left Reid's office on Feb. 17 so that Castillo could compose herself. Following Reid's reference to dishonesty being a terminable offense, Castillo had started to cry. Once outside the presence of Reid, Castillo remarked that she could not believe that this matter over a turkey had escalated to a terminable offense. However, Schumann pointed out that Reid was now upset because somebody was lying, either Castillo or Gray. Schumann asked Castillo to "come clean," but Castillo continued to deny any wrong doing. It was at this point, that Schumann told Castillo that she had spoken with Gray, who did not support Castillo's story. Castillo's response was simply that Gray must not remember what happened. Castillo continued to insist that she had in fact called Gray and requested that Gray pick up a turkey for her.

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By this time, Schumann had obviously become exasperated with Castillo. She launched into a discussion with Castillo about "integrity," telling Castillo that having "breached" her integrity, she could not easily recover it. Schumann, in her straight forward matter of fact way, told Castillo, "Either you are straight up or you are not, but once you breach credibility, you are,

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<sup>&</sup>lt;sup>9</sup> It is unnecessary under the theory expressed in the *La-Z-Boy* and *Burnup & Sims* cases to show employer animus in order to find a violation of the Act. Never the less, in the case at hand, animus directed toward Castillo's protected concerted activity is clearly established by Reid's demonstrative response to the grievance. She was visibly upset, and shaking the grievance form, she repeated Castillo's written reference to the Respondent as being cheap.

pretty much, toast." They got into a brief discussion about other employees with whom Castillo had previously had issues of credibility. However, Castillo continued to insist that she had done nothing wrong, and was not lying about her conversation with Gray. 11

Schumann became increasingly frustrated with Castillo's continuing claim that she had in fact spoken with Gray, and finally Schumann told her, "You breached your credibility. You lost your integrity in my mind. You lost your integrity in the Company's eyes, and you have lost integrity with your fellow stewards and coworkers." Schumann testified that Castillo was attempting to show Gray to be a liar, which was a "bad thing" for a steward to do. According to Schumann, she now had two issues to deal with. She separated the matter of Reid's threat to discharge Castillo from the issue of Castillo's continued performance as steward. Schumann told Castillo, "Either you can resign as a steward, or I am going to remove you."

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According to Schumann, prior to this private conversation with Castillo, she and Reid had not had any discussion about Castillo's position as steward, or of her possible removal from that position. Schumann testified that the reason she decided that Castillo must be removed as steward was because, "I cannot have somebody [as steward] that cannot be honest with me, is not honest with the Employer [when] representing the membership. I cannot have it."

Schumann told Castillo that "first and foremost" she was concerned that Castillo not be fired. She explained to Castillo that the steward matter was "a secondary issue...an in-house issue." The question of whether Castillo remained as steward was solely "the business of the local union."

In her testimony, Schumann acknowledged that during their private conversation, Castillo made the comment that "[Reid] wants me removed as a steward. [Reid] does not want me to be a steward." However, Schumann told her that "[Reid] does not have anything to do with it. [Reid] does not get a say in it. That is not up to the Company."

Schumann indicated that her conversation with Castillo was "lengthy," long enough for Schumann to have smoked several cigarettes. Toward the end of the conversation, Castillo said that she would resign as steward, "if [Schumann thought] it is going to help." Schumann replied, "Gees, Estella, I do not think it is going to hurt." After which, Schumann went back inside the office alone to talk with Reid.

Castillo's version of these events is different from that version told by Schumann and Reid. The most significant disparity is Castillo's contention that Schumann and Reid had a private one hour meeting, following which Schumann announced to Castillo that Reid was willing to let her keep her job, but only if she resigned as steward. Castillo testified that she was

On a number of occasions throughout the course of the trial, evidence was offered of interaction between Castillo and other employees in an effort to show that in general Castillo was not a credible individual. This included testimony from Gray that Castillo had once asked Gray to lie for her in court about a traffic ticket, which Castillo had received. However, I have decided to give such testimony no weight in reaching my decision in this case. The issue before me is not whether Castillo was in general a credible individual, but, rather, whether she lied about the alleged turkey conversation with Gray, and whether Schumann had a reasonable basis for believing that Castillo was lying to her.

<sup>&</sup>lt;sup>11</sup> Castillo's continued protestations of innocence in the face of significant evidence to the contrary reminded me of the words of a recently popular song, namely "It's my story and I'm sticking to it."

"shocked," but agreed to resign as steward, because she had no choice. As I have noted, I do not credit Castillo. I do not believe that a person with as strong a personality as Schumann has, who is an experienced union leader, would have admitted to Castillo that the Employer's representative had effectively decided who could or could not be the Union's steward.

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The Union's position statement submitted in response to Castillo's unfair labor practice charge in Case 28-CB-6157 was admitted into evidence. (G.C. Exh. 13.) That statement is largely in conformity with Schumann's testimony that Castillo was told that she could either resign or <u>Schumann</u> would replace her.<sup>12</sup>

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Further, Reid testified that when Schumann returned to her office without Castillo at the time of the final grievance meeting, Schumann informed her that Castillo was resigning as steward. Reid testified that it is the exclusive right of the Union to decide who serves as a job steward. She agreed that under the terms of the parties' collective-bargaining agreement, the Employer has no role in this selection process. Reid denied that Schumann made a "proposal" to her, which consisted of Castillo resigning as steward in return for Castillo retaining her job.<sup>13</sup>

I do not believe that the Charging Party's resignation as a union steward was a *Quid Pro Quo* for not being terminated. I do not believe that Schumann would have made such a "deal" with the Respondent. Even assuming for the sake of this discussion that, as counsel for the General Counsel has not so subtlety suggested, Schumann found Castillo difficult to deal with, Schumann did not need Reid's help in order to remove Castillo as steward. As noted earlier, Schumann impressed me as a "hard nosed," practical union business agent, who would be very unlikely to give the Respondent an authority it did not have under the contract or the law, that being a voice in the retention of union stewards. The weight of the credible and probative evidence convinces me that Reid was not involved in the resignation of Castillo as steward.

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Further, I will not grant counsel for the General Counsel's request that I make as a finding of fact counsel's contention that Schumann testified that "she lacked the authority to unilaterally remove Castillo from her steward position." According to counsel for the General Counsel, this statement was inadvertently omitted from the official transcript. Respondent's counsel objects to such finding. While I do not remember Schumann's testimony as counsel for the General Counsel apparently does, I am not suggesting that my recollection of that testimony is any better than his. However, Schumann's overall testimony regarding her relationship with the stewards who reported to her, certainly left me with the impression that this strong willed individual could have a steward removed, if she chose to do so.

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<sup>13</sup> Although in her affidavit given to the Board during the investigation of this case, Reid does apparently use the term "proposal" when referencing Schumann's argument that Castillo should not be discharged, I do not find this inconsistency significant enough to outweigh the preponderance of the evidence supporting the contrary position.

<sup>&</sup>lt;sup>12</sup> Following the hearing, counsel for the General Counsel filed with the undersigned a Motion to Correct the Record, after which counsel for the Respondent filed a Response, followed by the General Counsel's Reply. (Documents respectively marked and admitted into evidence as G.C. Exh.14, Res. Exh.11, and G.C. Exh. 15.) Upon review, I will grant the requested change in the record as proposed by counsel for the Respondent, as being consistent with the record as a whole, to read as follows: "I will agree that this is something that had Ms. Castillo asked to see, they would have let her see it." (page 418, line 25 to page 419, line 1.)

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I also reject counsel for the General Counsel's argument, as expressed in his post-hearing brief, that Reid's investigation and threat of discharge was the "proximate cause" of Castillo's resignation. What caused Castillo to resign was clearly Schumann's conclusion that Castillo had lied to her and management regarding the turkey grievance, and had involved another steward, Gray, in the deception. As Schumann told Castillo, "You lost your integrity in my mind.... Either you can resign as a steward or I am going to remove you." Obviously, Schumann had become dissatisfied with Castillo's performance as steward. Castillo resigned because Schumann wanted her to.

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Accordingly, the General Counsel has failed to establish that on February 17, 2004, the Respondent, by Reid, forced Castillo to resign from her position as a union steward in lieu of being discharged by the Respondent, as alleged in paragraph 5(e) of the complaint. Therefore, I shall recommend that this paragraph of the complaint be dismissed.

# 3. Rule Prohibiting Castillo from Discussing the Resignation, and 4. Threat of Reprisals for Doing So.

Paragraph 5(b) of the complaint alleges that on February 17, 2004, the Respondent, by Reid, orally promulgated and has since maintained an overly broad and discriminatory rule prohibiting employees from speaking to their fellow employees regarding the resignation of Castillo from her position as a union steward. Paragraph 5(c) of the complaint alleges that on the same date, Reid threatened employees with unspecified reprisals if they violated this rule. The support for this allegation comes almost entirely from the testimony of Castillo regarding what she claims occurred during the remainder of the grievance meeting held on February 17.

According to Castillo, after she told Schumann that she would resign as steward in order to keep her job, Schumann mentioned that "there would not be any paper trail," and as Castillo was going to have surgery, employees would simply be told that she took a leave of absence. Allegedly, once Castillo returned to Reid's office, Reid repeated what Schumann had told Castillo, specifically that as she was resigning as steward there would be no paper trail. Both Reid and Schumann then added that if Castillo "talked to any other employees about the situation...the grievance, that there [would] be repercussions." According to Castillo, she

responded that "it did not seem fair," and that it was all "a bunch of crap."

Once again, the testimony of Reid and Schumann is at significant variance with that of Castillo. As I have throughout this decision, I continue to find Schumann's version of these events more inherently plausible, and continue to credit her over Castillo. According to Schumann, after Castillo said she would resign as steward, Schumann returned to Reid's office alone. Both Schumann and Reid were in agreement that Castillo had lied about Gray's involvement, but Schumann asked Reid not to fire Castillo over the incident. Schumann reminded Reid that Castillo was a 20 year employee, who had a good work record. Schumann said that she did not like being lied to any more than Reid did, but that the incident was "not a terminable offense," and "not worth taking somebody's career over it."

According to Schumann, at some point she and Reid "had gotten over the hump of the termination," meaning that Reid agreed not to fire Castillo. Reid calmed down, and it was only at that time that Schumann informed Reid that Castillo had resigned as steward. Schumann brought Castillo back into the meeting, and Reid informed Castillo that she had decided not to terminate her. Schumann testified that Reid then delivered a lecture to Castillo about integrity and how important that was to the Employer.

Schumann brought up the subject of Castillo having resigned as steward, which then led to a discussion about how the resignation was going to look to the employees, and what the supervisors would be told. Schumann testified that both she and Reid "were trying diligently to make sure that [Castillo] could save face." They decided that as Castillo was about to go on medical leave for her foot surgery, the word that would be passed along to employees was that she resigned for personal reasons. According to Schumann, this would permit Castillo to "transition smoothly" from the steward position, and would lessen the "chit-chit-chit on the shop floor" about the resignation. People would tend to talk about the resignation of a 20 year steward, and the intent was to lessen the "scuttlebutt, gossip, [and] nonsense." Schumann credibly denied that either she or Reid ever said or indicated that there would be repercussions for talking about this matter.

For the most part, Reid's testimony supports Schumann. According to Reid, she was convinced by Schumann's arguments that as a 20 year employee of the Company, Castillo should not be terminated for having lied about the turkey grievance. She then learned from Schumann that Castillo was resigning from her steward position. Once Castillo returned to the office, Castillo repeated what Reid already knew, that she was resigning as steward. Reid informed Castillo that she was not going to be fired over dishonesty. Reid testified that she then told Castillo that their discussions would stay in her office, but that if Castillo heard any "gossip on the floor by employees and/or management people," that "she needs to come to me directly." Further, Reid told Castillo that she (Reid) "would not discuss [Castillo's] decision to step down as a steward" with anyone else.

It appears reasonable that the references by Schumann and Reid to not talking about these matters was a combined effort by the Employer and the Union to protect Castillo's reputation, by not disclosing the conclusion they had reached that Castillo lied about the turkey grievance, and by not publicly linking Castillo's resignation as steward with that dishonesty. This was not an admonition against the Charging Party talking about these matters with other employees, assuming she chose to do so. Rather, this was an effort by Schumann and Reid to keep these matters private, and, thus, to protect Castillo from unwanted gossip and speculation by other employees. I do not believe that Castillo was warned by either Reid or Schumann against discussing these subjects with her fellow employees, if she herself so desired. I cannot imagine what possible advantage to the Respondent could be derived from directing Castillo not to have such discussions, and threatening her with retribution for doing so.

To the contrary, I perceive these statements by Reid and Schumann as their promises not to disclose to managers or other employees what had transpired on February 17. These promises were made to and for the benefit of Castillo. However, under the General Counsel's conspiracy theory, what was intended as a protection for Castillo against idle gossip is "turned on its head" and becomes an alleged rule prohibiting employee discussion of the circumstances surrounding Castillo's resignation as steward. I simply do not accept this interpretation, and do not believe the facts support it.

The only evidence offered in support of Castillo's version of these events is the testimony of Greg Phair and Karen Gray regarding what they were allegedly told by Schumann. Of course, Schumann is an agent of the Union, which is not a Respondent in this proceeding. In addition, the evidence offered was inadmissible as hearsay. Schumann allegedly told Phair that the Castillo turkey grievance was none of his business. This alleged conversation occurred in March of 2004, after the February 17 grievance meeting. It could certainly be argued that any such reference was an attempt by Schumann to keep her promise to Castillo and prevent

gossip about the resignation. Further, this testimony from Phair about an alleged reference by Schumann, who is not a party opponent in this proceeding, is obviously an out of court statement offered for the truth of the matter asserted, and, therefore, is inadmissible hearsay.

Similarly, Gray testified that in February of 2004 she had been told by Schumann that Castillo was instructed not to talk about the turkey grievance or there would be repercussions. This information was originally contained in a letter dated August 3, 2004, which Gray had prepared at Castillo's request for submission to Andy Marshall, the secretary/treasurer of the Union. (G.C. Exh. 7.) Presumably, this letter was written to aid Castillo and its language met Castillo's needs, as it was given to Castillo, who forwarded it on to Marshall. Again, Schumann does not represent a party opponent, and the evidence proffered is an alleged out of court statement offered for the truth of the matter asserted. As such, it constitutes inadmissible hearsay.

Counsel for the General Counsel suggests that the existence of the alleged rule prohibiting Castillo from discussing her resignation or the turkey grievance with other employees is supported by the absence of any "paperwork" on this matter maintained by either the Employer or the Union. Reid testified that she did make notes during her investigation of whether Castillo was lying concerning Gray's involvement with the turkey. Although these notes were brief, they were produced during the trial and admitted into evidence at the request of counsel for the General Counsel. (G.C. Exh. 5.) By stipulation, the parties agreed that Castillo's personnel file is devoid of any reference to the allegation that she was dishonest about the turkey grievance, or any indication that Reid conducted an investigation into these matters. However, unlike the General Counsel, I do not view any of this as suspicious. Reid credibly testified that Castillo was not disciplined because Schumann prevailed upon her not to terminate a long term employee over this lapse in honesty regarding the turkey grievance. Therefore, as there was no discipline, there was really nothing to document. Further, as Castillo's resignation was a private matter between the Union and its steward, it would have been inappropriate for the Respondent's files to have contained any such references.

Regarding the absence of any notes made by Schumann documenting her representation of Castillo, her investigation into the turkey grievance, and Castillo's resignation as steward, counsel for the General Counsel forgets that the Union is not a respondent in this proceeding. Schumann's conduct is not alleged to be unlawful. To the contrary, as counsel well knows, the charge brought against the Union by Castillo alleging a failure to properly represent her interests in the turkey grievance has been found to be without merit and dismissed by the General Counsel. (Res. Exh.1 & 2, Case 28-CB-6157.)

Further, it could certainly be argued that the absence of a "paper trail" was in furtherance of the promises, which Reid and Schumann made to Castillo, to limit the gossip into these matters. By ensuring that Castillo's employment personnel file and union file were devoid of any references to these matters, Reid and Schumann could prevent the "prying eyes" of supervisors or employees from learning that Castillo had been accused of dishonesty by Reid, or that she had been asked to resign as steward by Schumann. Finally, I see no evidence that the absence of such a paper trail establishes a "conspiracy of silence" by Reid and Schumann to deprive Castillo of her right under the Act to discuss these matters with other employees.

The weight of the credible probative evidence clearly supports a finding that the Respondent, through Reid, did not establish a rule prohibiting its employees from discussing the resignation of Castillo from her position as steward, or the circumstances surrounding the filing and processing of the turkey grievance. Accordingly, the General Counsel has failed to establish that on February 17, 2004, the Respondent, by Reid, orally promulgated and has since

maintained an overly broad and discriminatory rule prohibiting employees from discussing the resignation of Castillo from her position as steward, as alleged in paragraph 5(b) of the complaint. Concomitantly, the General Counsel has failed to establish that on February 17, the Respondent, through Reid, threatened employees with unspecified reprisals if they violated such a rule, as alleged in paragraph 5(c) of the complaint. Therefore, I shall recommend that these paragraphs of the complaint be dismissed.

#### **Conclusions of Law**

- 1. The Respondent, United Parcel Service of America, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. The Union, International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(1) of the Act by threatening to fire its employees because they filed and processed grievances under the terms of the collective-bargaining agreement between the Respondent and the Union.
- 4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
- 5. The Respondent has not committed the other violations of law that are alleged in the complaint.

### The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended 14

35 ORDER

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- 1. The Respondent, United Parcel Service of America, Inc., its officers, agents, successors, and assigns shall cease and desist from:
- (a) Threatening to fire its employees because they filed and processed grievances under the terms of the collective-bargaining agreement between the Respondent and the Union; and
  - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

<sup>14</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. The Respondent, United Parcel Service of America, Inc., its officers, agents,	
successors, and assigns shall take the following affirmative action necessary to effectuate t	he
policies of the Act:	

- (a) Within 14 days after service by the Region, post at its Tempe, Arizona, facility copies of the attached Notice marked "Appendix." Copies of the Notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the Notices are not altered, 10 defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Respondent at its Tempe, Arizona, facility at any time since February 17, 2004; and 15
  - (b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at San Francisco, California, on July 8, 2005.

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25 Gregory Z. Meyerson Administrative Law Judge 30 35 40 45

<sup>&</sup>lt;sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### **APPENDIX**

### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT threaten to fire you because you file and process grievances under the terms of our collective-bargaining agreement with the International Brotherhood of Teamsters, Local No. 104, General Teamsters (Excluding Mailers), State of Arizona, AFL-CIO (the Union).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

		UNITED PARCEL SERVICE OF AMERICA, INC.		
		(Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue, Suite 1800 Phoenix, Arizona 85004-3099 Hours: 8:15 a.m. to 4:45 p.m. 602-640-2160.

### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.